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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 478

LOUIS SACHS AND RALPH SACHS, *Petitioners*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITIONERS' REPLY BRIEF

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This case turns not on complex factual issues,[1] but on straightforward legal issues, all of which the Government appears unwilling to confront.

In support of its assertion that this case creates no conflict between the Fifth and Eighth circuits on the need for a cautionary instruction when an

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[1] The bulk of the Government's brief (pp. 2-8) is devoted to its "statement of the case," a marshalling of the evidence from a view most favorable to the Government. Since petitioners have not argued that there was insufficient evidence upon which a properly instructed jury could have convicted (see Pet. 10), this entire portion of the brief is irrelevant.

entire case[2] is built on uncorroborated[3] accomplice testimony, the Government (Gov. Br. 9-10) strains to distinguish *Phelps* v. *United States*, 252 F. 2d 49 (5 Cir. 1958), but it cannot explain away *Williamson* v.

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[2] The Government attempts to persuade this Court that there was ample evidence, untainted by Mrs. Wells, to sustain the conviction. (Gov. Br., p. 9 n. 5.) This is not true.

First, Mrs. Wells' testimony was indispensable to conviction on all but the third count, involving the Smith loan. As to that count, she did not testify at all. The only evidence culpably linking either Sachs brother to Count 3 was provided by Howard Hunt, a witness acknowledged even by the Eighth Circuit to have been in Mrs. Wells' and Rouillard's employ in the claim-peddling scheme. (Pet. App. 20a.) Thus, he had the same motivation to fabricate the Sachs brothers' involvement in these frauds as Mrs. Wells. The credibility defect in his testimony would have been covered by the Sachs' request for an instruction advising the jury to treat with caution the evidence of one motivated by self-interest in testifying as he did. (Tr. 857-58.) But the trial court denied this instruction as well as the accomplice instruction. Hunt's testimony is therefore subject to the same defect as Mrs. Wells'.

Second, the Government argues that the double collection under the Costello loan (Count 2), admitted by the Sachs brothers, was improper under Missouri law and law generally, citing to *Strode* v. *Meyer Bros. Drug Co.*, 101 Mo. App. 627, 74 S.W. 379 (1903) and similar cases. As pointed out in petitioners' brief (p. 4 n. 2), the *Strode* line of cases do not support this argument. All they establish is that a creditor may not overinsure his debtor's life; if he does collect insurance in excess of the amount owed at death, that excess must be paid over to the deceased debtor's estate. But the Sachs brothers did not overinsure Costello's life. The insurance policy, by its terms, paid only the amount of the debt owed at Costello's death. The Government, like the Eighth Circuit, then chooses to ignore the law on the critical issue, whether Costello or his co-obligors were entitled to the benefit of payment under the insurance policy so as to extinguish their liability on the note. Under the Missouri collateral source rule, it is clear they were not. *Wells* v. *Thomas W. Garland, Inc.*, 39 S.W. 409, 442 (Mo. App. 1931); *Julian* v. *Davis*, 214 Mo. App. 525, 259 S.W. 142 (1924). Since Costello and his co-obligors were not entitled to claim the benefit of payment under the insurance policy (a contract to

United States, 332 F. 2d 123 (5 Cir. 1964). It attempts to dismiss the *Williamson* case on the "ground" that the Fifth Circuit "appears to have reached the conclusion that the alleged accomplice should have been disbelieved." (Gov. Br. 10.) The explanation for both cases is, of course, that the Fifth Circuit agrees with petitioners' contention that, while our legal system tolerates putting a man in prison on the mere word of one whose own involvement motivates him to lie, funda-

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which Costello was not only a stranger, but in which he had specifically refused to participate), that payment did not extinguish their liability under the note, and Missouri courts would have enforced continued collection from Mrs. Costello.

Third, the Government argues that the loan companies alone received the benefit of the double collections. Again, it must rely exclusively on Mrs. Wells. Petitioners pointed out that the fact the insurance checks had been deposited to the loan company's account did not prevent Wells or Rouillard from receiving the proceeds therefrom, since they could easily have deposited the checks while pocketing a simultaneous cash withdrawal. (Tr. 744-45.) To refute this version of events, Mrs. Wells testified that the proceeds of all checks had been deposited to old uncollectible accounts (from which no funds could be withdrawn). Her testimony on this point is uncorroborated. The corporation had been sold prior to the time the indictment was returned; the successor corporation destroyed records after a certain period of time, and the bookkeeping records could not be found. (Tr. 384-86, 515-23.)

Fourth, the Government argues that petitioners dispute facts "resolved on proper instructions by the jury." This, of course, begs the very question at issue.

[3] The Government states that Mrs. Wells' testimony was "corroborated" by the testimony of the branch manager, in regard to Count 5. This statement is contradictory to another part of the Government's brief (pp. 10-11 n. 7, where the Government seeks denial of the petition on the ground that Mrs. Wells' testimony "was not implicated [sic]" in this count). In addition, as pointed out, infra pp. 5-6, this statement is false.

The Government does not even claim there was corroboration on any other count.

mental fairness requires that the jury at least be cautioned to think carefully before accepting that word. The Eighth Circuit disagrees. Had petitioners been tried in the Fifth Circuit, their convictions would have been reversed; since they were tried in the Eighth, their convictions stand. It is as simple as that.

Alternatively, the Government argues that, regardless of any conflict in circuits, the denial of an accomplice instruction[4] was proper on the astounding ground that the instruction would have been inconsistent with the Sachs brothers' claim of innocence. (Gov. Br. 10.) Surely they cannot seriously contend that only a defendant who pleads guilty is to be given the protective instruction.

One of the most significant issues presented by petitioners is whether it is proper to view the evidence in the light most favorable to the prosecution in determining whether it was reversible error to refuse a defense-requested instruction. (Pet. 9-12.) The Gov-

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[4] The Government's contention that it was proper to refuse *any* instruction because the trial court might have preferred different wording than that contained in the instruction submitted by the defense defies characterization. A criminal trial is not a word game. Ten years of these men's liberty is at stake. Indeed, since they are both in their sixties, what is at stake may well be the rest of their lives. The defense adequately alerted the trial court to its contention that the evidence supported an accomplice instruction. If the trial court did not deem the requested instruction proper in part, it was free to reject the specific request (*Bass* v. *United States*, 324 F. 2d 168, 172 (8 Cir. 1963)) and substitute its own. It cannot, however, refuse to give any instruction at all in the event that counsel, lacking clairvoyance, does not hit upon the specific wording the trial judge likes. See 5 Orfield, CRIMINAL PROCEDURE UNDER THE FEDERAL RULES, § 30:37, pp. 65-66; *Hoback* v. *United States*, 284 F. 529, 533-35 (4 Cir. 1922).

ernment ignores petitioners' contentions that this mode of review as applied to an issue of instructional error stands the law on its head. (Pet. 10-11.) As far petitioners' attack upon the misapplication of the harmless error doctrine to the instructional error, the Government relegates the whole issue to a footnote. (Gov. Br., pp. 10-11 n. 7.) If this Court permits such facile subversion of the harmless error doctrine, the doctrine itself will soon be reduced to an anachronistic though interesting footnote in legal history. (See Pet. 11-12.) The Government says, in its footnote, that the doctrine is not involved because the Eighth Circuit "did [not] apply a 'harmless error' rule *as such*." (Gov. Br., pp. 10-11 n. 7. Emphasis added.) Perhaps it views the Eighth Circuit's citation to the doctrine of "reversible error" (see Gov. Br. 10) as involving something different. The footnote also asserts that the harmless error doctrine is not involved because the Eighth Circuit relied upon a count in which Mrs. Wells' testimony was "implicated." The Government's statement, undoubtedly through inadvertence, is flatly wrong. Mrs. Wells' testimony was demonstrably indispensable to a conviction on the count referred to, Count 5, involving the Lewis loan. (Pet. App. 17a-18a.) The critical issue was the identity of the person who issued the instructions concerning the disposition of the excess Lewis insurance proceeds. Mr. Collier, the branch manager, testified that the instructions were telephoned by someone in the home office, but could not remember whether the caller was Louis Sachs, Ralph Sachs, or Mrs. Wells. (Tr. 148-49, 137, 176-77.) Mrs. Wells testified that she had never had a telephone conversation with Mr. Collier, that she had given him no instructions concerning the Lewis refund check, and

that Louis Sachs had dictated all the correspondence. (Tr. 390-393.)

Respectfully submitted,

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